In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 894

COLONIAL REFRIGERATED TRANSPORTATION, INC., A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. B) dismissing in conformity with the court's opinion (J.S. App. A)[1] appellant's suit to set aside orders of the Interstate Commerce Commission in its Docket No. MC-115841 (Sub-No. 48), *Colonial Refrigerated Transportation,*

[1] The district court's opinion is reported at 255 F. Supp. 999.

Inc., Common Carriers "Grandfather" Application. The basic issue is the validity of the Commission's partial denial of the application of appellant for motor-carrier "grandfather" authority under Section 7(c) of the Transportation Act of 1958, 72 Stat. 573, 49 U.S.C. following 303(b)(6), to transport certain frozen commodities.[2]

On December 8, 1958, Colonial Refrigerated Transportation, Inc., filed an application for "grandfather" authority to transport frozen fruits, berries, and vegetables, coffee beans, and bananas, in straight loads and in mixed loads with frozen seafood and frozen poultry, from points in 27 States to points in 39 States and the District of Columbia (J.S. App. A, pp. 21-22). After full administrative proceedings, the Commission found that Colonial Refrigerated Transportation, Inc., had established *bona fide* "grandfather" operations from, to, and between certain points, and authorized issuance of a certificate substantially more limited than that sought (J.S. App., p. 23, n. 5). Several petitions for further consideration of the limited grant of authority were denied by the Commission.

On November 3, 1964, appellant filed its original complaint in this court proceeding. However, before filing its answer, the Commission on its own motion

[2] In *Battaglia* v. *United States*, *per curiam*, No. 564, O.T., November 21, 1966, and in *Exley Express, Inc.* v. *United States*, *per curiam*, No. 644, O.T., December 12, 1966, a similar issue was presented in respect to frozen fruit, frozen berries, and frozen vegetables. In the former the Commission denied in part the motor carrier's application while in the latter, as here, it substantially granted the application.

allowed appellant to file a petition for reconsideration within 45 days, specifying by commodities, routes, and territories the additional authority to which it claimed to be entitled. In its subsequent report on reconsideration, the Commission concluded that, applying the standards established under this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159, appellant was in fact entitled to broader authority than had previously been awarded, but not to the full extent claimed in its petition (J.S. App., p. 25, n. 7).

On appeal, the district court found that "the orders of the Commission delineating the scope of 'grandfather' authority to which plaintiff [appellant] was entitled, are in accord with the applicable law and supported by substantial evidence of record" (J.S. App., p. 29).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The legal standards of the "grandfather" clause of Section 7(c) were fully considered and determined by this Court in *Willis Shaw Frozen Express, Inc.* v. *United States*, *supra*. Like the *Battaglia* and *Exley* cases (*supra*, n. 2), this appeal involves only the application of those standards to particular circumstances.[3]

[3] The *Shaw* decision and the Commission's actions thereunder are discussed in the motion to affirm filed by the United States and the Interstate Commerce Commission in *Battaglia* v. *United States*, No. 564, O.T. 1966, pp. 4–5.

The authority granted appellant by the Commission achieved substantial parity with its prior *bona fide* operations, and was properly sustained by the court below. The district court fully implemented the applicable law as defined by this Court in *Shaw* and *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 (J.S. App., pp. 27–28). Thus, referring to the specific criteria stated by this Court in *Shaw*, the lower court found (J.S. App., p. 28):

> We are persuaded by the record in this case that the Commission gave due consideration to plaintiff's status and performance as a common carrier of a restricted number of commodities, the transportation characteristics and marketing pattern of the seasonal agricultural products involved, and the *demonstrated* ability of plaintiff to perform the services described in its application in placing restrictions on the articles which plaintiff may carry between the several points of origin and destination, as required by *Willis Shaw Exp.* v. *United States, supra.*

The district court noted that "[t]he Commission's report of August 19, 1965, contains an exhaustive analysis of the record evidence" (J.S. App., p. 28). Referring to this Court's prior decision in *Carolina Carriers, supra,* the court held that the authority granted appellant by the Commission "is a far cry from atomizing a carrier's prior service, product by product, so as to restrict the scope of its operations" (J.S. App., p. 29).

The precise scope of an individual carrier's "grandfather" right under Section 7(c)—a subject of con-

tinuing litigation'—always turns on the particular facts of the case. Here the correct standard was applied to the partciular circumstances of this record. There is no occasion for further review.

'Subsequent to this Court's decision in *Shaw*, seven Section 7(c) cases have been filed in the district courts. In two such cases the Commission decision has been sustained: *Battaglia* v. *United States*, *supra*, n. 2, and *Exley Express, Inc.* v. *United States*, *supra*, n. 2; in two cases the Commission decision was reversed: *Willis Shaw Frozen Express, Inc.* v. *United States*, 256 F. Supp. 257 (W.D. Ark.), and *Winter Garden Co.* v. *United States*, Civil Action No. 5457 (E.D. Tenn.); and three cases are still pending: *Lester C. Newton Trucking Co.* v. *United States*, Civil Action No. 2508 (D. Del.); *W. W. Hughes* v. *United States*, Civil Action No. 41335 (E.D. Pa.); and *Trans-Cold Express, Inc.* v. *United States*, Civil Action No. 3–1558 (N.D. Tex.).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
WILLIAM R. WEISSMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
NAHUM LITT,
Attorney,
Interstate Commerce Commission.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 894. Decided March 27, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.